

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

**IN THE MATTER OF  
THE PERMIT OF**

**V.F.W. #9733  
3602 W. WESTERN AVENUE  
SOUTH BEND, INDIANA 46619**

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**PERMIT NO. RC71-19065**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

The Permittee, V.F.W. #9733, 3602 W. Western Avenue, South Bend, Indiana 46619 (“Permittee”), permit number RC71-19065, is the applicant for renewal of a type 211-4 Alcohol and Tobacco Commission (“Commission”) permit. The application was assigned to the St. Joseph County Local Alcoholic Beverage Board (“Local Board”). On August 24, 2005, the Local Board heard the renewal request and voted 4-0 to deny the renewal. The Commission adopted the Local Board’s recommendation on September 13, 2005.

The Permittee filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on July 6, 2006, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing (“Local Board Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and the contents of the entire Commission file (“ATC File”), now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission.

## **II. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Permittee in this cause:
1. Roger Sartin, Sr., Commander of V.F.W. #9733.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Permittee in this cause:

None.

- C. The following individuals testified before the Local Board against the Permittee in this cause:

1. Aladean DeRose, Chief Assistant City Attorney for the City of South Bend.

- D. The following evidence was introduced and admitted before the Local Board against the Permittee:

1. Letter from Aladean DeRose to Prosecutor Jenny Drewry regarding permit no. RC71-19065;
2. Indiana State Excise Police Report for violation which occurred on February 24, 2005; and,
3. Officer's report from Sgt. John W. Mortakis.

## **III. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Permittee in this cause:

1. Roger Sartin, Sr., Commander of V.F.W. #9733;
2. Robert Ford, Quartermaster for V.F.W. #9733.

- B. The following evidence was introduced and admitted before the Commission in favor of the Permittee in this cause:

1. Exhibit A – Membership Listing printed May 18, 2005; and,
2. Exhibit B – Agreement to Lease between John Colley and V.F.W. Post #9733.

C. The following individuals testified before the Commission against the Permittee in this cause:

1. Aladean DeRose, Chief Assistant City Attorney for the City of South Bend.

D. The following evidence was introduced and admitted before the Commission against the Permittee in this cause:

1. Affidavit of Ann-Carol Nash;
2. VFW Eligibility Information;
3. Proposed Findings of Fact and Conclusions of Law adopted by former Hearing Judge Daniel M. Steiner on November 18, 1998; and,
4. Letter from Aladean DeRose to Prosecutor Jenny Drewry regarding permit no. RC71-19065.

#### **IV. FINDINGS OF FACT**

1. The Permittee, V.F.W. #9733, 3602 W. Western Avenue, South Bend, Indiana 46619, permit number RC71-19065, is the applicant for renewal of a type 211-4 ATC permit. ATC File.

2. The Permittee is a fraternal club pursuant to Ind. Code § 7.1-3-20-7. ATC File.

3. In 2005, the permanent membership of the Permittee was composed of (i) twenty seven (27) life members; and, (ii) thirty seven (37) annual members. ATC Hearing.

4. The annual dues of each of Permittee's members is Twenty Dollars (\$20). ATC Hearing.

5. The aggregate membership dues are insufficient to sustain the Permittee's cost of operating an establishment where alcoholic beverages are sold exclusively to members. ATC Hearing.

6. Permittee cannot financially sustain an alcoholic beverage licensed permit

premises without sale to non-members on a regular, continued basis. ATC Hearing.

7. Permittee is under capitalized; therefore, Permittee is incapable of operating the permit premises in full compliance with the law. ATC Hearing.

8. At the time of the Local Board Hearing, Permittee was three (3) months in arrears on its lease payments. ATC Hearing

9. The City of South Bend denied a restaurant license to the Permittee for its permit premises; and, has no lease or property interest of any kind in any other real estate located within the City of South Bend. ATC Hearing.

10. Permittee has not filed an application for renewal of its alcoholic beverage permit in 2006. ATC File.

11. Permittee has a pattern and history of serving alcoholic beverages to non-members. ATC File & ATC Hearing.

12. On February 24, 2005, the Indiana State Excise Police ("Excise") conducted an enforcement action and cited the Permittee for (i) sale of alcoholic beverages to non-members; (ii) promoting professional gambling; (iii) retail to retail sales; (iv) sale of tobacco without a certificate; and, (v) possession of stolen property. ATC File.

13. Pursuant to Ind. Code § 7.1-3-4-2, the Local board found that the Permittee was ineligible to hold an alcoholic beverage permit. Local Board Hearing.

14. The Hearing Judge took judicial notice the (i) Local Board transcript; (ii) the Commission file; and, (iii) the application for renewal of the permit at issue.

15. The Permittee was fined Two Thousand Dollars (\$2,000) for the violations which took place on February 24, 2005; however, the Permittee had not paid the fine at

the time of the appeal hearing on July 6, 2006.

16. To date, Permittee has not paid the Two Thousand Dollar (\$2,000) fine for the violations which took place on February 24, 2005.

17. Any finding of fact may be considered a conclusion of law if the context so warrants.

## **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to Indiana Code § 7.1-1-2-2 and § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. A permit which is not renewed or temporarily extended “shall be fully expired and null and void.” Ind. Code § 7.1-3-1-3.

8. Because Permittee failed to (i) apply for renewal of its permit in 2006; and, (ii) obtain a temporary extension, the permit is “fully expired and null and void.” Id.

9. Permittee’s failure to hold a bona fide lease in any real estate where alcoholic beverages are to be served disqualifies it from holding an alcoholic beverage permit. Ind. Code § 7.1-3-4-2(a)(3).

10. “No holder of a [fraternal] club shall sell or give alcoholic beverages to any person not a member of the club...” 905 IAC 1-13-3.

11. The Local Board properly denied renewal of the Permit because of Permittee’s (i) longstanding pattern and practice of sale of alcoholic beverages to non-members; (ii) inability to financially survive without likely continued violations of the law that prohibits sales of alcoholic beverages to non-members

12. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the application of V.F.W. #9733, 3602 W. Western Avenue, South Bend, Indiana 46619, permit number RC71-19065, should be DENIED and the recommendation of the Local Board is UPHELD.

Dated: \_\_\_\_\_

\_\_\_\_\_  
U-Jung Choe  
Hearing Judge

**DISTRIBUTION**

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